Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-304

RICHARD A. GORDON, individually and as President of INDEPENDENT INVESTOR PROTECTIVE LEAGUE, an incorporated association, and in behalf of the membership thereof and in behalf of all persons similarly circumstanced,

Petitioners,

against

NEW YORK STOCK EXCHANGE, INC., AMERICAN STOCK EXCHANGE, INC., and MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. and BACHE & COMPANY, INC., individually and as representatives of all member firms of the New York Stock Exchange and American Stock Exchange,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' BRIEF

MAXIMILIAN BADER
I. WALTON BADER
Attorneys for Petitioners
40 Morrow Avenue
Scarsdale, N.Y.
Telephone 914-779-1344

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

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PETITIONERS' BRIEF

Petitioner has moved for a writ of certiorari to the United States Court of Appeals for the Second Circuit in this case. The writ was granted by this Court and this brief is thus submitted on the merits.

OPINIONS OF THE COURTS BELOW

The District Court (*Gordon vs. New York Stock Exchange*, 366 Fed. Supp. 1261 dismissed the Complaint pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, holding that the "fixed commission" rate structure of the defendant Stock Exchanges and Brokerage

firms was not subject to the anti-trust laws because of surveillance by the Securities and Exchange Commission. The United States Court of Appeals for the Second Circuit affirmed (498 Fed. (2nd) (1303).

JURISDICTION OF THIS COURT

This Court obtains jurisdiction to review the determination of the Court of Appeals for the Second Circuit pursuant to 28 USC 1254(1). The Petition for a Writ of Certiorari was filed within ninety (90) days from the date of the determination of the Court of Appeals. Jurisdiction to review was granted by Writ of Certiorari.

STATUTES INVOLVED

This case involves the consideration of the provisions of the anti-trust laws of the United States with the provisions of the Securities Acts of the United States. The pertinent statutes are as follows:

SHERMAN ACT, Section 1 [15 USC 1]

"Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ***"

SHERMAN ACT, Section 2, [15 USC 2]

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor ***"

SECURITIES AND EXCHANGE ACT OF 1934, Section 19b[15 USC 78s(b)]

"The commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as *** (9) the fixing of reasonable rates of commission, interest, listing and other charges. ***"

THE QUESTION PRESENTED FOR REVIEW

Are the defendant Exchanges and the Broker Members of such Exchanges, entitled to fix minimum rates of commission even though ordinarily this would be a violation of the anti-trust laws, in view of the provisions of the Securities and Exchange Act of 1934, giving the Securities and Exchange Commission the powers set forth in 15 USC 78s(b)(9).

STATEMENT OF THE CASE

The record below consists of the Complaint, the Answers of the Defendants, and affidavits of the parties on the merits. All of the pertinent material is contained in the Appendix submitted herein. However it does appear to the plaintiffs that, while there are factual issues involved, the

primary question is one of law relating to the question set forth hereinabove.

ARGUMENT

THE DEFENDANT EXCHANGES AND THE BROKERAGE COMMUNITY ARE NOT EXEMPT FROM THE ANTI-TRUST LAWS SINCE SUCH EXEMPTION IS NOT NECESSARY TO MAKE THE SECURITIES ACT WORK. ALSO THE COMMISSION ITSELF, IN VARIOUS OTHER PROCEEDINGS, HAS STATED THAT IT HAS NO JURISDICTION OVER COMMISSION RATES AND HAS NEVER APPLIED THE POWERS GIVEN TO IT UNDER SECTION 19 OF THE SECURITIES AND EXCHANGE ACT OF 1934.

It is admitted that, without the Securities Act provisions, the fixation of minimum rates of commission together with penalties for the violation of such fixed rates, would be *per se* violations of the anti-trust laws. [*United States vs. Trenton Potteries Co.*, 273 US 392; *U.S. vs. Topco Associates, Inc.*, 405 US 596; *Northern Pacific Railway Co. vs. US.* 356 US 1, *Schwegmann Bros. vs. Calvert Distillers Corp.*, 341 US 384.

There is basically no dispute that, were it not for the Provisions of the Securities Acts, fixed brokerage commissions would be clearly illegal. The illegality is heightened by the fact that there are *penalties* against any Exchange Member for failing to observe the fixed rates. The Supreme Court of the United States in the leading case of *Silver vs. New York Stock Exchange*, 373 US 341, held that the Securities Industry is not a "regulated industry" which exempts it from the Anti-Trust Laws. However, this Court did state in *Silver* that if an exemption was necessary

in order to "make the Securities Acts work", such a situation might have to be considered at that time.

Kaplan vs. Lehman Brothers, 371 Fed 2nd 410, did hold that fixed Commission rates, since they were under the "supervision" of the SEC would be exempted from the Anti-Trust Laws. However, this case, a Seventh Circuit Determination was impliedly overruled by the later case of *Thill Securities Corp. vs. New York Stock Exchange*, 433 Fed 2nd 264. In *Thill*, (which is now sub judice by the United States District Court after remand by the Court of Appeals), the Attorney General of the United States has proposed the elimination of all fixed Commission rates as violations of the Anti-Trust Laws.

The Court's attention is also called to the later decided case of *Harwell vs. Growth Programs, Inc.*, 451 Fed 2nd 240.

The District Court took the position that the fixed Commission rates imposed by the Defendants herein were "approved" by the SEC and so were necessary in order to make the Securities Acts work. It is interesting to note, however, that the SEC, in two actions taken by the Plaintiff Independent Investor Protective League, specifically held that the Commission did not fix Commission rates. In a memorandum submitted to this Court, in Docket No. 71-1924, in support of the Commission's Application to Dismiss the League's Petition for Judicial Review of its' action with respect to certain Commission rates imposed by the Defendant Exchanges, had this to say:

> **** "In the present case, the Commission conducted no proceeding—let alone a proceeding "to which . . . [petitioners were] a party"—that could have resulted in "judicial action" by the Commission. The Commission's letter of comment to the Exchange did not order the Exchange, petitioners or any other person to do or to refrain

from doing anything. Nor did the letter "approve" or "disapprove" the Exchange's proposals. The letter was anything but a "definitive" determination "dealing with the merits" of the Exchange's rule amendments. ****"

In the subsequent Civil Action brought by the Independent Investor Protective League against the SEC, in the United States District Court for the District of Columbia, (Civil Action 1984-71), the Commission again denied that it had any power to fix Commission rates. Its' Brief read, in part, as follows:

**** "However, the question of the type and extent of immunity that may flow from Commission determinations regarding exchange rules and practices need not be decided in this case. The appropriate forum for resolution of that question is in an antitrust action against a self-regulatory organization challenging its rules or the administration of such rules. Indeed, plaintiffs recognize that they may seek to challenge exchange rules directly; they have instituted suit against the New York Stock Exchange for this very purpose. ****"

**** "The suggestion that the Commission has "approved" or "disapproved" any exchange rule or practice by its informal comment letters is refuted by the Act itself. Under the Act, the exclusive method by which the Commission may disapprove the rules of an exchange is a proceeding under Section 19(b) "to alter or supplement" such rules. This is highlighted by the quite different powers that Congress vested in the Commission with respect to the rules of national securities associations, the other major self-regulatory force in the securities industry. Section 15A(j) of the Act, 15 U.S.C. 78*o*-3(j), provides that a national

securities association must file any "change in or addition to" its rules before such rules take effect and that, if the proposed rules are inconsistent with specified provisions of the Act, "the Commission shall enter an order disapproving such change or addition. ****"

The latest determination by this Court with respect to the question of Administrative Agency jurisdiction suspending operation of the Anti-Trust Laws is *Otter Tail Power Company vs. United States,* 410 US 336, 93 Sup. Ct. 1022(1027) where this Court said:

"* * * Repeals of the antitrust laws by implication for a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions. (citing cases) Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.

See also *United States vs. Philadelphia National Bank,* 374 US 321, *California vs. FPC,* 369 US 482, *US vs. RCA,* 358 US 334.

CONCLUSION

THE MOTION TO DISMISS THE COMPLAINT SHOULD BE DENIED. THE MOTION FOR SUMMARY JUDGMENT DENIED. SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF THE PLAINTIFFS OR, ALTERNATIVELY, THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

Respectfully submitted,

MAXIMILIAN BADER
I. WALTON BADER
Attorneys for Plaintiffs
40 Morrow Avenue
Scarsdale, New York 10583